No. 01-5002

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STEPHANIE MOHR,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

Defendant Stephanie Mohr has appealed her conviction for violating 18 U.S.C. 242. The district court had jurisdiction under 18 U.S.C. 3231. The court pronounced sentence on December 10, 2001 and entered final judgment on December 13, 2001 (JA 26, 590).[1] Mohr filed her notice of appeal on December 10, 2001 (JA 596). This Court has jurisdiction under 28 U.S.C. 1291.

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[1] "JA __" refers to the page number of the Joint Appendix. "SA __" indicates the page number of the Supplemental Appendix submitted with this brief. "Br. __" refers to the page number of Appellant's opening brief.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in admitting evidence under Fed. R. Evid. 404(b) of two of the six other incidents in which the defendant had intentionally misused her police dog, where her primary defense in the present case was that she did not have the requisite intent to use excessive force when she had her dog attack a homeless man who had surrendered to police.

2. Whether the district court committed reversible error in admitting a witness's prior statement and allowing him to explain during redirect examination his motivation for making the statement.

3. Whether the trial court abused its discretion or committed plain error in allowing the United States to present an expert on prevailing police standards to rebut the testimony of the defendant and her police training officer.

4. Whether the record conclusively demonstrates that the defendant was deprived of effective assistance of counsel because her trial attorney failed to timely raise a constitutional challenge to the district court's jury selection plan and to the federal jury service statute.

5. Whether the district court committed errors whose cumulative effect requires a new trial.

STATEMENT OF THE CASE

On September 20, 2000, a federal grand jury returned an indictment charging Mohr and Anthony Delozier with violating 18 U.S.C. 242 by acting under color of law to willfully deprive Ricardo Mendez of his due process right to be free from

the use of unreasonable force (JA 31). The indictment alleged that Mohr intentionally attacked Mendez with her police dog after he had surrendered, resulting in bodily injury (*ibid.*). Both defendants were also charged with conspiracy to violate civil rights under 18 U.S.C. 371 (JA 27-30). A third defendant, Brian Rich, was charged as an accessory after the fact under 18 U.S.C. 3 (JA 32).

A jury trial was held from February 26 to March 14, 2001, before Judge Deborah K. Chasanow (JA 12-15). The jury was unable to reach a verdict on the substantive charge against Mohr and the conspiracy count against Delozier, and a mistrial was declared (JA 15).[2] The jury acquitted Mohr on the conspiracy count and Delozier on the substantive charge (JA 15). The jury was also unable to reach a verdict on the charge against Rich, which the Court subsequently dismissed (JA 15, 17).

Mohr's counsel filed a number of motions prior to the retrial (JA 16-21). Two weeks before the second trial, the defense moved to dismiss the indictment on the ground that the district court's jury selection plan and 28 U.S.C. 1863(b)(6) were unconstitutional (JA 119-131). The district court denied the motion as untimely (JA 132-134).

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[2] Despite Mohr's citation to alleged facts from a story in *The Washington Post* (Br. 3 & n.1), which is not part of the record, there is no record evidence regarding the precise jury vote in the first trial. Mohr's citation to the *Post* article is improper, and this Court should disregard it or allow the United States to supplement the record with evidence contradicting the *Post* article.

Mohr's and Delozier's retrial commenced July 31, 2001 (JA 22). On August 15, 2001, the jury returned a guilty verdict against Mohr on the Section 242 charge and acquitted Delozier on the conspiracy count (JA 24).

STATEMENT OF FACTS

A. Offense Conduct

The evidence at the retrial showed that Mohr intentionally used her police dog to attack a homeless man who had already surrendered to the police. The government's evidence included not only the testimony of Mendez and another victim (SA 92-102, 118-119), but also the accounts of four police eyewitnesses who confirmed that the victims never attempted to flee and never presented any threat to the police or public (SA 124-145, 66-85, 27-40, 48-58).

During the early morning hours of September 21, 1995, the Takoma Park (Maryland) Police Department was conducting surveillance in response to break-ins at local businesses around Holton Lane, in Prince George's County, Maryland ("PG County") (SA 27-28). At the time, Mohr was a police officer assigned to the canine unit of the PG County Police Department (SA 214).

During the surveillance, a Takoma Park officer spotted two men on the roof of a building (SA 29). He alerted other Takoma Park officers, several of whom reported to the scene and set up a perimeter around the building (SA 30-31). Among those officers was Sergeant Dennis Bonn, a 27-year police veteran, who assumed tactical control of the scene (SA 121, 123-124). Bonn called for assistance from the PG County Police Department and a Maryland State Police

helicopter (SA 125-127). Numerous PG County officers, including defendants Mohr and Delozier, responded and helped surround the building (SA 68-69, 125-127). Mohr had her police dog with her (SA 68). Mohr, Delozier, Bonn and several other officers gathered at the rear of the building, which Bonn had determined to be the best and safest location to bring the two men down from the roof (SA 129-130).

When the State Police helicopter arrived, it illuminated the entire roof with a powerful light (SA 49, 53, 70). The two men on the roof, Ricardo Mendez and Jorge Herrera-Cruz, were ordered to move toward the back of the building where the police were concentrated. They immediately complied and held their hands above their heads (SA 34-35, 70-72, 130-131). According to the victims and numerous police witnesses, the men complied with all police commands from that point on – they never attempted to flee, and they took no action that threatened the police or public (SA 34-39, 54-55, 58, 72-75, 138-140, 144-145, 156-157). They had given up.

As ordered, Mendez and Herrera-Cruz descended from the roof in front of Mohr and the other officers (SA 55-56, 72-75, 131-133). At that point, the men were surrounded by officers who had their guns drawn, were confronted with a barking police dog, and were illuminated by the police helicopter hovering overhead (SA 53-56, 74-75, 97). Mendez and Herrera-Cruz stood motionless, still holding their hands above their heads (SA 75-77, 133-135).

Then, with the two men totally compliant, Delozier approached Bonn and asked, "hey, Sarge, it's a new dog, can it get a bite" (SA 87, 75-76, 135). Bonn said "go ahead" (SA 75). Mohr, without issuing any canine warning,[3] then willfully released her dog to attack the two men, who still had not moved and posed no threat (SA 75-79, 138-140). The dog attacked and severely injured Mendez, taking a large chunk of flesh out of his leg (SA 42, 83-85, 86). Mendez testified that Mohr also hit him on the head with a flashlight as the dog was mauling him (SA 100). Simultaneously, another unidentified PG County officer beat Herrera-Cruz (SA 82-83). It was subsequently discovered that the two victims were not burglars at all, but homeless men who were sleeping on the roof (SA 44-45, 90-91, 113).[4]

B. The Defense Theories

The heart of Mohr's defense, as it had been in the first trial, was that she did not have the specific intent to use unreasonable force, as required for a conviction under 18 U.S.C. 242. Rather, she claimed that she faced a dangerous situation involving two men whom she thought were not following police commands, and

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[3] A canine warning is required by the PG County Police Department and is designed to give a suspect the opportunity to surrender before the police dog is released. A typical warning is: "[T]his is the Prince George's County K-9 Unit. Stop or I'm going to let the dog go" (JA 490).

[4] Defendant Rich nevertheless charged both victims with burglary. The charges against Mendez were dismissed, but Herrera-Cruz spent 60 days in jail before pleading guilty in a *pro se* proceeding in order to receive a sentence of time served (SA 140-105). This charging decision was a key basis of the federal indictment of Rich under 18 U.S.C. 3 (JA 32).

that she acted according to her training and released her dog in what she intended to be a reasonable use of force. She asserted that she released the dog to stop Mendez from fleeing (JA 143-144, 153-154; SA 251-252, 254-258).

Mohr took the stand and offered a version of events different both from the government witnesses and from her own police report filed the night of the incident (JA 375-384, 396; SA 62-63).[5] Mohr claimed she issued a loud canine warning while Mendez and Herrera-Cruz were still on the roof, and she asserted that she and others ordered the two men to show their hands and lie down on the ground, but that they did not comply (JA 375-378, 381, 393-394). Mohr alleged that, after standing in front of her for 30 seconds, Mendez made a single quick pivot. She claimed that she interpreted this as an attempt to flee, and it caused her to believe that she had no reasonable alternative other than to immediately set her dog loose to prevent escape, and so she yelled "stop" and released her dog to attack (JA 381-383, 396; SA 231-232).

Mohr testified extensively about her training in the use of force, including handling police dogs and making arrests generally (JA 369-374, 386-392). In order to set the stage for and bolster Mohr's testimony, the defense called Paul Mazzei, a private consultant and former PG County police officer who had trained Mohr and other patrol officers in arrest methods (JA 308-309, 313-314, 318). Mazzei

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[5] At sentencing, the district court imposed an upward adjustment in Mohr's offense level after finding that she committed perjury in both of her trials (SA 261-263).

provided specialized and technical testimony regarding how (he claimed) PG County officers were trained. First, he testified about the different "level[s] of force that would be reasonable to be used [in] a particular situation" (JA 319; see also JA 320-323, 327, 329, 332-334). Second, he testified about the procedures that police are trained to use to make a felony arrest (JA 335-348, 354-355) – procedures which Mohr testified she followed during the incident on September 21, 1995 (JA 375-378, 381, 384, 393-395). Finally, Mazzei testified about factors that place an officer in danger during an arrest (JA 323-324, 334, 337-341, 343, 346, 352-356, 361) – factors that Mohr later repeated in describing the incident (JA 377-381, 384, 393-394).

In combination, Mohr's and Mazzei's testimony echoed the defense theory that Mohr acted in accord with her training. As Mohr's counsel summarized her position: "I did what I was taught. I thought [Mendez] was running. I thought he was going to go. I let the dog on him * * *." JA 154; accord JA 143 ("I saw something, and based on my training, I reacted, and I did just exactly what I was taught to do.").

C. Rebuttal Testimony Of Dr. James Fyfe

The United States called an expert witness, Dr. James Fyfe, to rebut the testimony of Mohr and Mazzei. Fyfe, a former New York City police lieutenant and nationally recognized expert on prevailing police practices regarding the use of force, was called to testify principally on two topics (JA 427-441). First, he was called to dispute Mazzei's testimony regarding where a police canine falls on the

"use of force continuum" (JA 405, 413). Second, Fyfe was called to rebut the implication left by Mohr's and Mazzei's combined testimony that Mohr's version of the incident was consistent with standard police practices (JA 415, 419). Specifically, Fyfe testified that the events described by Mohr in her trial testimony were not "in accord with prevailing police practices in 1995" (JA 473).

Fyfe's opinion testimony was expressly linked, both in the prosecutor's questions and Fyfe's responses, to prevailing police standards and practices (JA 453, 473, 475, 477-478, 543). Fyfe explained the sources of the prevailing standards and practices, and testified that they applied nationwide, including in Maryland, and that he had reviewed pertinent PG County Police Department policies and training materials from 1995 on the use of force to verify that they were consistent with these prevailing police standards and practices (JA 450-453, 481-483). Fyfe's testimony rebutted Mohr's and Mazzei's combined testimony that everything Mohr claimed she had done on September 21, 1995, was "by the book."

D. Testimony Of Dennis Bonn

One of the government's witnesses was Sergeant Dennis Bonn, who had entered into a plea agreement with the United States (SA 146-150). Bonn testified on direct examination, among other things, that while the two homeless men were standing on the ground with their hands up, defendant Delozier approached Bonn and asked, "Sarge, can the dog get a bite?," to which Bonn replied "yes" (SA 134-

135, 138, 145, 153-154). Bonn's account of this exchange was corroborated by Takoma Park police officer Keith Largent, who testified at trial (SA 75-76).[6]

During the government's investigation of the attack on Mendez, Bonn initially gave inconsistent statements to the FBI that failed to mention the exchange he had with Delozier about the dog "getting a bite" (SA 152). However, on August 23, 2000, Bonn gave a written statement ("Voluntary Statement") in which he admitted to the FBI that Delozier had asked whether the dog could take a bite and that he had agreed (SA 187-189, 196-197).

Prior to the retrial, the United States alerted the district court and the defendants in writing that, depending on the defense openings and cross-examination of Bonn, it might elicit testimony on redirect examination about Bonn's motivation for making the admission in his Voluntary Statement (SA 15-16, 21-22). Specifically, the government proffered that Bonn would testify on redirect that he admitted the exchange with Delozier because he was asked if he wished to take a polygraph examination, and Bonn believed that he would fail the test unless he admitted his misconduct (SA 21-22; JA 242-245; SA 189-192). The United States' proffer made clear that Bonn ultimately declined to take the test and that no polygraph examination was ever administered to him (SA 22).

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[6] At the first trial, Bonn's account was also corroborated by defendant Rich (SA 1-3), whose testimony was excluded from the second trial upon motion of the defense (SA 4-5).

Despite this written pretrial notice provided by the United States, the defense divulged the substance of Bonn's Voluntary Statement in its opening argument (JA 151), and then showed the written statement to Bonn and repeatedly used it in cross-examining him (SA 185-188, 196-197). Indeed, it was Mohr's counsel, not the government, who first asked Bonn about this Voluntary Statement (SA 187-189, 196-197; JA 260-261 (judge pointing out that Mohr's attorney first used the statement)). See also JA 261 (co-defendant's attorney noting that, unlike Mohr, he had "intentionally stayed away" from the Voluntary Statement based on the notice from the government). When Mohr's attorney started questioning Bonn, not only on the substance but about the conditions under which he had made the Voluntary Statement (SA 187-189), the prosecutor advised the court that Bonn was having difficulty answering the questions because he had been instructed not to mention the word "polygraph" during his testimony (SA 189-190). The prosecutor also advised the court and the defense that the questions by Mohr's counsel had opened the door for Bonn to testify on redirect examination that his true motive for making the admission in his Voluntary Statement statement was his fear of failing a polygraph test (SA 189-192). Mohr's counsel nonetheless continued questioning Bonn about the Voluntary Statement (SA 196-197).

Both in opening statements and cross-examination, the defense suggested numerous improper motives for Bonn to fabricate his Voluntary Statement and his trial testimony. Among these were: (1) a financial incentive related to his police pension that his attorney was able to secure for him by negotiating an agreement

with the United States to permit a 40-day delay of his guilty plea (JA 151-152, 240-B; SA 149-150, 158-161, 171-172); (2) a provision in his plea agreement that shielded him from prosecution for a separate potential misdemeanor offense that involved throwing someone's personal belongings into a creek (JA 150-151; SA 168-170, 192-194); (3) coaching or coercion by federal agents and prosecutors (SA 176-179, 181-182, 184-185); (4) the fact that his plea agreement allowed him to plead guilty as an accessory after the fact rather than a principal to the crime (SA 165-168); and (5) the opportunity for a downward departure for substantial assistance that was available in his plea agreement (JA 152).

In light of Mohr's use of the Voluntary Statement during the opening argument and cross-examination of Bonn, her questions about the conditions under which the statement was made, and her suggestion that he had improper motives for making it, the district court ruled that Bonn could explain on redirect his true motivation for giving the statement to the FBI (JA 242-269).

On redirect examination, the United States introduced, without objection, Bonn's Voluntary Statement as an exhibit (JA 267). The government then showed Bonn the statement and, again with no objection from the defendant, had him read its contents to the jury (JA 267-268). The prosecutor also asked Bonn to explain, in his own words, the reasons for making the admission contained in his Voluntary Statement (JA 265-266). Bonn testified that he "decided to come clean" because he feared that otherwise he would fail a polygraph test that he had consented to take (JA 266-267). Bonn made clear, however, that he ultimately decided not to go

through with the polygraph examination (JA 266). He also testified that, at the time he made the Voluntary Statement, he had not retained an attorney and had not engaged in plea negotiations with the United States (SA 180, 187; JA 264; SA 204-206; SA 21).

This brief testimony was subjected to vigorous re-cross examination, which elicited from Bonn that no polygraph was in fact administered because he declined to take one (SA 203), that he knew polygraph results are "inherently unreliable" and "not admissible in court" (SA 198), and that some aspects of his Voluntary Statement were still inconsistent with his trial testimony (SA 198-205, 210). In addition, Delozier's counsel published the Voluntary Statement to the jury on re-cross, again without objection from Mohr (SA 208-209).

E. The 404(b) Evidence

1. The District Court's Ruling

During the first trial, the defense argued not only that Mohr did not possess the specific intent to use unreasonable force, but also that she did not even possess general criminal intent, rather acting by mistake, inadvertence or negligence. See JA 37-39 (quoting defense arguments from first trial). Having heard these defenses, the United States moved *in limine*, three and a half months before the retrial, for permission to introduce evidence of six other occasions where Mohr intentionally used or threatened to use excessive force while acting as a police officer assigned to the canine unit (JA 33-40). All six of the incidents involved the actual or threatened attack of individuals with her police dog. The United States

fully disclosed complete summaries of each incident to the defense in writing (JA 34-53). In opposing the government's motion, Mohr acknowledged that she had argued "lack of criminal intent in the first trial and will likely do so in the next" (SA 10).

Judge Chasanow, who had presided over the first trial, issued a written opinion articulating the legal test for admission of evidence under Fed. R. Evid. 404(b) and finding: (1) "that intent is an issue in dispute in this case," and (2) that "[t]he [six] incidents in question cannot be excluded based on relevance" (JA 68-69). But rather than immediately ruling on admissibility, the judge elected to conduct an independent review of supporting documentary evidence for each incident in order to assess reliability and to do the balancing test required under Fed. R. Evid. 403 (JA 69). The United States submitted an array of supporting material to the court and the defense, including FBI reports, police department records, depositions from civil cases, medical records, and transcripts from related criminal cases (JA 44-51 (summarizing all six incidents); JA 58-61 (evidence supporting the six incidents); JA 82, 88).

After reviewing this material and holding a hearing on the matter (JA 72-115), the court found the evidence "relevant, necessary, and reliable" for three of the six incidents (JA 112). The court specifically found, "based upon the first trial, that there is a necessity for the Government to utilize similar incident evidence in order to demonstrate intent" (JA 111). The judge then conducted a balancing test under Rule 403, concluding that there was "no undue prejudice" for two of the

three remaining incidents, and reserved ruling on one matter because of the chance that it would create a cumbersome "mini trial" (JA 112-114). (The United States elected not to pursue that matter further at trial.) Thus, although she found all six incidents relevant, the judge permitted the United States to present evidence on only two of those incidents (JA 110-115).

2. The Two Incidents Admitted Into Evidence

The two incidents on which the United States was permitted to present evidence involved Mohr's intentional misuse of her police dog to threaten or attack individuals who had committed no offense and were offering no resistance or posing any threat to the police or public. In each case, Mohr used the dog to threaten or summarily punish people who presented no risk to her or the public. The government presented this evidence through the brief testimony of four witnesses. The direct examination of these witnesses lasted a total of about half an hour (out of a nine-day trial) and comprised a total of 52 pages (in a trial transcript of over 2,000 pages) (JA 167-182, 203-220, 270-278, 292-300). The following is a summary of the two incidents:

a. Hairston Incident

In July 1998, Jocilyn Hairston was living with her mother, Marie Hawkins. Late one night, Hairston was awakened by three PG County police officers who came to her house looking for her brother, who had an outstanding California arrest warrant for leaving that state in violation of his parole (JA 168-169, 173-175, 193-194, 295-296). One of the officers was Mohr, who had her police dog with her (JA

175-177, 193-194, 296, 299-300). Hairston advised the officers that her brother was not there (JA 177-178, 194). The officers requested permission to search the home, and Hairston consented and waited by the front door (JA 178, 181, 194).

While the two other officers searched the house within earshot of the front door, Mohr remained at the door with her dog, which was barking and close to Hairston (JA 170, 177-178, 181, 187, 294-297, 303). Hairston told Mohr she was "scared of the dog" and asked if Mohr would move the canine further away from her (JA 179-180, 185, 196). Mohr refused, and then threatened Hairston, warning her that if she was lying about her brother's whereabouts, Mohr would release the dog so that it would "bite your black ass and your brother if I find out he's in there" (JA 179). A few moments later, Mohr repeated the threat (JA 298). Hairston testified that she was scared by Mohr's threat, which was made while the dog was "jumping up" (JA 179-180). Mohr also asked Hairston: "[W]here is your brother, back in California? Is that what you people do for a living, waving guns in people's face?" (JA 180).

Hairston testified about the incident at trial (JA 167-182) and was subjected to vigorous cross-examination attacking her credibility and challenging the accuracy of her identification of Mohr (JA 184-186, 191-196). The government then called Hairston's mother as a witness. In brief testimony, she corroborated Hairston's account of the incident, including Mohr's threat with the police dog, and provided a positive in-court identification of Mohr (JA 297-300). The defense also

presented its own evidence about the incident, including contradictory testimony from Mohr and her supervisor (SA 215-216, 240-247).

b. Sneed Incident

In the early morning hours of August 3, 1997, Mohr and her police dog were tracking a possible suspect in a commercial burglary who had run from the police. Their search led them to a residential neighborhood where they came across 16-year-old Kheenan Sneed sleeping in a hammock in a backyard (SA 217-223; JA 204, 210-211, 220-225). Without giving any canine warning, Mohr released her dog to attack Sneed while he was sleeping (JA 211-212, 219, 222, 224-225, 229, 273-274). As the dog was biting the teenager, Mohr struck Sneed with a flashlight on his head and upper body, even though he never resisted (JA 212-213, 216, 219, 272, 274-277, 285-286; SA 224). Mohr then handcuffed Sneed and allowed her dog to continue biting him for another 20 to 30 seconds while he lay on the ground (JA 213-215, 232-233). At least one other officer was on the scene to potentially witness her actions (JA 214-215; SA 233-234, 235-236). Sneed was not the suspect the police were seeking, and he was never charged with a crime (JA 218, 236; SA 226-227).

After Sneed testified to these events, the defense aggressively cross-examined him, challenging his credibility and implying that he was soundly sleeping and therefore missed Mohr's canine warning (JA 224-226, 228-235, 238). After the defense challenged Sneed's account, the government called his mother as a witness. She testified that she had observed Mohr beating her son and never

heard any canine warning (JA 271-277). Mohr subsequently testified about the incident, defending her conduct as reasonable and claiming Sneed had not complied with her warnings (SA 216-227).

SUMMARY OF ARGUMENT

The Court should affirm Stephanie Mohr's conviction.

1. The district court did not abuse its discretion in admitting evidence under Fed. R. Evid. 404(b) of two of the six other incidents in which Mohr intentionally misused her police dog to threaten or attack individuals who were neither resisting nor posing a risk to the police or public. The testimony about these two incidents was admissible as evidence of Mohr's specific intent to use unreasonable force in this case when she had her police dog attack an individual who had surrendered to police. The testimony was especially necessary, given Mohr's defense that she did not act with the requisite criminal intent when she released her dog on the man.

The court acted within its broad discretion in deciding that the probative value of the two incidents was not substantially outweighed by unfair prejudice. During one of those incidents, Mohr threatened to have her dog bite the "black ass" of a homeowner who was cooperating with police. Mohr claims that her "black ass" comment should have been excluded because it portrayed her as a racist. But that comment was inextricably intertwined with Mohr's threat. The jury needed to hear Mohr's precise words so that it could assess whether her statement to the homeowner was, in fact, an illegitimate threat. The exact language Mohr used was especially relevant in light of the defense argument that, absent the alleged racist

comment, Mohr's conduct toward the homeowner had been entirely appropriate. The government did not emphasize the "black ass" comment, and the testimony admitted under Rule 404(b) constituted only a tiny fraction of the trial. The district court took a number of steps to minimize the risk of prejudice, including the issuance of jury instructions that this Court has found sufficient to cure the prejudicial impact of 404(b) evidence.

2. Mohr's challenges to two portions of Dennis Bonn's testimony on redirect examination also lack merit. First, Mohr argues that the court erred in allowing Bonn to read to the jury his voluntary statement to the FBI in which he first admitted his role in the dog attack. Mohr waived the right to appeal this issue and, at any rate, the statement was admissible under the "Doctrine of Completeness" and Fed. R. Evid. 801(d)(1)(B), as well as for purposes of rehabilitation.

Second, Mohr argues that the court abused its discretion in allowing Bonn to explain on redirect examination his motive for making the statement to the FBI. Prior to trial, the prosecution advised Mohr that if she attacked Bonn's motive for making the statement, the government would seek to have Bonn explain on redirect examination that his true motivation was his fear of failing a polygraph if he did not "come clean." Despite this pretrial notice, Mohr explicitly questioned Bonn on both the content of the Voluntary Statement and the conditions under which it was made, and suggested in her opening argument and during cross-examination that Bonn made the statement because of several improper motives. In light of the false

impression Mohr conveyed about Bonn's motives, the district court did not abuse its discretion in allowing the government to present brief testimony from Bonn on redirect about his true motive – *i.e.*, his fear of failing a polygraph test. Bonn's testimony made clear to the jury that he ultimately decided not to take a polygraph examination, and that he understood polygraph results were unreliable and inadmissible in court. Consequently, Bonn's brief reference to a polygraph test did not improperly bolster his testimony or otherwise interfere with the jury's credibility determinations.

3. The district court did not abuse its discretion in allowing the government's expert to testify in rebuttal that Mohr's conduct was not in accord with "prevailing police practices" as of 1995. Contrary to Mohr's argument, this testimony did not express an impermissible legal opinion. In cases alleging excessive use of force, courts typically allow expert witnesses to express an opinion on whether the police conduct fell below accepted law enforcement standards. In this case, the expert testimony was particularly appropriate because it rebutted the combined testimony of Mohr and her training officer, which was designed to convey the impression that Mohr's version of events was consistent with proper police tactics. Although Mohr also attacks four other comments that the expert made in explaining his testimony about prevailing police practices, she did not object to those statements below and the district court did not commit plain error in admitting them.

4. Mohr is not permitted to pursue her ineffective assistance of counsel claim on direct appeal based on this record. She contends that her trial counsel's performance was ineffective because – although he filed a raft of pretrial motions and helped Mohr avoid conviction at the first trial – he failed to raise a timely constitutional challenge to the District of Maryland's jury selection plan and to a portion of the federal jury service statute, 28 U.S.C. 1863(b)(6). Because such a constitutional challenge is meritless, the failure to raise it in a timely fashion cannot be considered ineffective representation.

5. The district court did not abuse its discretion or commit plain error in making any of the evidentiary rulings that Mohr challenges on appeal. Thus, Mohr cannot show that there was cumulative error justifying a new trial.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE LIMITED 404(B) EVIDENCE IN THIS CASE

A. Standard Of Review

The trial court has broad discretion under Fed. R. Evid. 404(b) to admit extrinsic act evidence, and this Court will defer to that decision unless it is "arbitrary and irrational." *United States v. Weaver*, 282 F.3d 302, 313 (4th Cir. 2002), petition for cert. pending, No. 01-10521. One component of the Rule 404(b) analysis – indeed, the heart of the defendant's challenge in this case – is a balancing of probative value and unfair prejudice under Fed. R. Evid. 403. *United*

States v. Aramony, 88 F.3d 1369, 1378 (4th Cir. 1996), cert. denied, 520 U.S. 1239 (1997). "Because the district court has first-hand knowledge of the trial proceedings," it "should be afforded wide discretion in determining whether evidence is unduly prejudicial," and its ruling "should not be overturned except under the most extraordinary of circumstances." *Id.* at 1377 (internal quotation marks omitted). The district court did not abuse its discretion in admitting the evidence under Rule 404(b).[7]

B. The Testimony About The Hairston And Sneed Incidents Was Admissible As Evidence Of Mohr's Specific Intent To Use Her Police Dog Unreasonably

The district court admitted evidence under Rule 404(b) about two incidents in which Mohr intentionally misused her police dog against individuals who were not resisting and posed no threat to the police or public. These incidents – which we will refer to as the Hairston and Sneed incidents – are described in detail at pp. 15-18, *supra*.

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[7] Mohr inaccurately attempts to portray the chief difference between the first and second trials as the admission of the 404(b) evidence (see Br. 3-4, 20). There were numerous significant differences between the first and second trials, including, but not limited, to: (1) the absence of co-defendant Brian Rich (and his testimony) from the second trial; (2) the new testimony of Jorge Herrera-Cruz, a second victim who traveled from El Salvador to provide a video deposition (see SA 118-119), (3) the new testimony of David Wassink, a State Police helicopter pilot whose eyewitness testimony contradicted defense evidence presented at the first trial (SA 48-58), and (4) new expert medical testimony regarding Mendez's injuries which further corroborated his account of events (SA 115-117). In fact, as compared with these areas of testimony, the extrinsic acts evidence presented by the United States was quite brief and a relatively small part of the trial. See pp. 15, *supra*.

Rule 404(b) allows a party to introduce evidence of extrinsic acts to prove "motive, opportunity, intent, * * * or absence of mistake or accident." *United States v. Queen*, 132 F.3d 991, 994 (4th Cir. 1997), cert. denied, 523 U.S. 1101 (1998). It is a "rule of inclusion," *ibid.*, which "admits all evidence of other crimes relevant to an issue in a trial except that which tends to prove only criminal disposition." *United States v. Mark*, 943 F.2d 444, 447 (4th Cir. 1991).

Evidence is admissible under Rule 404(b) if (1) it is relevant to some issue other than character; (2) it is necessary; (3) it is reliable; and (4) as required by Rule 403, its probative value is not "substantially outweighed" by its potential for unfair prejudice. *Queen*, 132 F.3d at 995. The balancing of probative value and unfair prejudice under Rule 403 "should be struck in favor of admissibility, and evidence should be excluded only sparingly." *Aramony*, 88 F.3d at 1378. Mohr does not challenge the reliability of the 404(b) evidence in this case but does argue that it is irrelevant, unnecessary, and unfairly prejudicial.

As the district court found, the Hairston and Sneed incidents were relevant to Mohr's intent in releasing the dog, which was the key disputed issue in the case (JA 68, 110). The more similar the other act is "(in terms of physical similarity or mental state) to the act being proved, the more relevant it becomes." *Queen*, 132 F.3d at 997. "This similarity may be proved 'through physical similarity of the acts or through the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic offense and charged offense [].'" *United States v. Van Metre*, 150 F.3d 339, 350-351 (4th Cir. 1998); see also *United States v.*

Hadaway, 681 F.2d 214, 217 (4th Cir. 1982) (subsequent acts probative of prior intent). Both the Hairston and Sneed incidents were highly similar to that charged in the indictment. The incidents involved intentional misuse of a police dog (either through an actual or threatened attack), as opposed to other types of force. The incidents were also highly similar because they all involved Mohr's misconduct toward individuals who were not resisting and posed no threat to the police or public. Finally, all the incidents were committed in the presence of other police officers. This fact was highly relevant to rebut the defense argument that Mohr never would have intentionally used unreasonable force in this case in the presence of witnesses, especially other officers (see JA 148-150; SA 248-249, 237-238).

Although Mohr essentially concedes that the Sneed incident was relevant (Br. 22-23), she contends that the Hairston incident was not sufficiently similar to the charged conduct because Mohr never released the dog on Hairston (Br. 16, 23-24). Mohr's reasoning is flawed. Threatening to have her dog attack an individual without proper justification indicates an intent to engage in unreasonable use of force, even if she did not actually turn the dog loose. In fact, the Hairston incident was so probative precisely because it isolated the very factor that was in dispute at trial – Mohr's intent.

The 404(b) evidence was also necessary. Evidence is necessary if "it is probative of an essential claim or an element of the offense," or "it furnishes part of the context of the crime." *Queen*, 132 F.3d at 997, 998. Mohr was charged with violating 18 U.S.C. 242, a "specific intent" crime. See *United States v. Ramey*, 336

F.2d 512, 515 (4th Cir. 1964), cert. denied, 379 U.S. 972 (1965). "A not-guilty plea puts one's intent at issue," *Van Metre*, 150 F.3d at 350, and the overarching theme of Mohr's defense at both the first and second trials was that she did not have the requisite intent to use excessive force when she released the dog on Mendez. See pp. 6-8, *supra*. In light of the government's heavy burden to prove specific intent beyond a reasonable doubt (JA 579-580) and Mohr's relentless attack on the strength of the government's proof of intent, the 404(b) evidence was "unquestionably necessary." *Van Metre*, 150 F.3d at 351 (testimony "was unquestionably necessary, since it was key evidence of an essential element of the crime of kidnaping, specific intent"); *Queen*, 132 F.3d at 997 (government could reasonably believe that 404(b) evidence "was necessary, in view of attacks on witness credibility, to bolster its proof of intent").

Mohr claims, however, that the 404(b) evidence was unnecessary because the government presented other abundant evidence probative of her criminal intent (Br. 16, 18-19). That argument misconstrues the "necessity" prong and ignores the fact that Mohr used every opportunity at trial to try to discredit the government's evidence of intent. Mohr chose her defense, and the United States was entitled to respond with the full weight of its evidence on the point. At any rate, Mohr's suggestion that the other evidence of intent was so overwhelming actually weighs in favor of upholding the district court's 404(b) ruling because any alleged error in admitting the evidence would necessarily be harmless.

The trial judge was particularly well-situated to determine the relevance and necessity of the government's 404(b) evidence. Having presided over the first trial, the judge was able to base the admissibility ruling not on what she anticipated the witnesses might say or the defense might argue, but on what she had heard them say and argue during the first trial. See JA 111-112 ("I also find, based upon the first trial, that there is a necessity for the Government to utilize similar incident evidence in order to demonstrate intent"). Judge Chasanow's unique vantage point weighs heavily in favor of deferring to her decision to admit the evidence of the Hairston and Sneed incidents.

C. The Probative Value Of The Hairston And Sneed Incidents Was Not Substantially Outweighed By The Risk Of Unfair Prejudice

Mohr's claim of unfair prejudice is directed almost exclusively at the Hairston incident.[8] The crux of her argument is that the district court permitted the government to "obtain[] its conviction by painting Ms. Mohr as a racist" (Br. 10) when it allowed two witnesses to testify that Mohr had used racist comments during the Hairston incident. Mohr appears to base this contention entirely on the evidence that she used the terms "black ass" and "you people" in the course of threatening Hairston (Br. 21). Mohr's arguments are meritless.

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[8] Mohr suggests (Br. 22-23) that the evidence about the Sneed incident was unduly prejudicial because it "bears such close similarity" to the conduct charged in the indictment. This is nothing more than an assertion that the Sneed incident should be excluded because it is so probative of intent. As this Court has emphasized, *unfair* prejudice "is certainly not established from the mere fact that the evidence is highly probative." *Westfield Ins. Co. v. Harris*, 134 F.3d 608, 615 (4th Cir. 1998).

1. Mohr's Actual Words Were Necessary To Show That She Threatened Improper Use Of Her Dog Against Hairston

The probative nature of the Hairston incident depended on showing that Mohr intended to threaten an unreasonable use of force against Hairston. In order to show that Mohr willfully made such an improper threat, it was important to set before the jurors the exact words Mohr used. This allowed the jury to judge for itself whether Mohr's comments were a legitimate warning to Hairston, an ambiguous and possibly misunderstood comment, or an inappropriate threat of unlawful misuse of her police dog. As the district judge properly recognized, Mohr's use of the term "black ass" was inextricably intertwined with the threat itself:

> I do not think there would have been an appropriate way to separate the alleged racial aspect of the comment from the threat itself. * * * I think * * * that the actual language was necessary to be used by this witness, what she says the K-9 officer said, in order to put the whole event properly before the jury.

SA 110-111.

Courts have repeatedly allowed admission of a defendant's racist comments – even in cases in which race is not an element of the offense – where they are intertwined with those portions of the defendant's statements that are probative of the issues in the case. See, *e.g.*, *United States v. Stradwick*, 46 F.3d 1129, 1995 WL 20672, at **4 (4th Cir. Jan. 20, 1995) (allowing admission, in drug prosecution, of letter containing racial slur by defendant) (copy in addendum); *United States v. Saunders*, 166 F.3d 907, 916-918 (7th Cir. 1999) (upholding the

failure to redact racial slur from letter where defendant's choice of language was probative of intent); *United States v. Price*, 13 F.3d 711, 715, 720-721 (3rd Cir. 1994) (allowing introduction, in a drug prosecution, of a tape recording containing numerous racial epithets, including references to rival gang as "niggers"), cert. denied, 514 U.S. 1023 (1995); *United States v. Schweihs*, 971 F.2d 1302, 1313-1314 (7th Cir. 1992) (no abuse of discretion in Hobbs Act prosecution in refusing to redact defendant's racially derogatory remarks from tapes); *United States v. Diaz*, 26 F.3d 1533, 1542 (11th Cir. 1994) (testimony in drug prosecution about defendant's use of word "nigger"), cert. denied, 513 U.S. 1155 (1995); *United States v. Krohn*, 573 F.2d 1382, 1389 (10th Cir.) (reference to "poor Black bastard" in mail fraud case), cert. denied, 436 U.S. 949 (1978).

The defense strategy in this case confirms the inseparability of Mohr's racist comments from the improper threat to attack Hairston. On appeal, the defendant asserts (Br. 16, 23-24) that, without the alleged racist comments, Mohr's statement to Hairston was a perfectly legitimate warning. She took the same position below (JA 159-160; JA 82-83, 86). Given Mohr's denials of any improper threat, the jury needed to hear the precise language used by Mohr to determine that her comments to Hairston constituted an intentional threat and had no innocent explanation.

2. The Limited References To "Black Ass" And "You People" Were Unlikely To Inflame The Passions Of The Jury

Mohr exaggerates the emotional impact that the "black ass" and "you people" comments would have on the jury. The "black ass" comment has much

less emotional impact than racial epithets that courts have found admissible in other cases in which race was not an element of the offense. See, *e.g.*, *Price*, 13 F.3d at 715, 720-721 (defendant's use of term "niggers"); *Diaz*, 26 F.3d at 1542 (same).

In addition, although Mohr tries to portray the words "you people" as racially derogatory, it is doubtful the jury interpreted them that way. Taken in context, the term "you people" was most naturally understood as a reference to the Hairston family and not to any racial group. Mohr used the term to suggest that Hairston and her family were guilty by association because of her brother's troubles with the law (JA 180). That was the sense in which Hairston herself understood it. See JA 180 (victim responded to statement, "I told her no, I work, and [so does] my mother. If my brother choose[s] to make a mistake, no, it doesn't reflect on me or my family.").

Mohr's brief also creates a misleading impression about the nature and extent of the government's references to the "black ass" comment. She asserts that the prosecutor referred to the "black ass" comment during his opening argument and then said: "That is how Stephanie Mohr's mind works. That's how you know what happened in the back of the Sligo Press on September 21, 1995 was no accident." Br. 20, quoting JA 140-M. When read in context, however, the prosecutor's reference to how Mohr's "mind works" pertained to her intent to turn her dog loose on a compliant, non-threatening person – not to her racism (see JA 140-L to 140-M). Moreover, in arguing that the government "repetitively elicit[ed] the derogatory comments" (Br. 21), Mohr incorrectly cites testimony that was

elicited by her own counsel on cross-examination, not by the United States (Br. 21, citing JA 195, 196, 303). A review of the direct examination of the two government witnesses who testified about the Hairston incident indicates that the government presented the testimony briefly, in proper narrative form, and did not emphasize the defendant's racist statements (see JA 173-182, 295-300). And the prosecutors never mentioned the "black ass" comment at all in closing argument or rebuttal (JA 583-584, 587-589).

3. The District Court Did Not Commit Plain Error In Failing To Redact References To Mohr's Racist Comments

Mohr argues on appeal (Br. 20-21) that even if evidence of the Hairston and Sneed incidents was properly admitted, the district court should have "redact[ed]" the references to "black ass" and "you people" from the testimony about the Hairston incident in order to avoid unfair prejudice. That argument lacks merit because, as we have explained, the jury needed to hear Mohr's precise language to assess for itself whether she made an inappropriate threat to misuse her police dog. See pp. 27-28, *supra*.

At any rate, Mohr failed to properly preserve the redaction argument for appellate review. She never specifically asked the district court to redact the statements. See *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728, 730-731 (6th Cir. 1994) (party who unsuccessfully objected to admission of document, but did not specifically request that certain statements be redacted once the district court admitted the document, forfeited right to challenge admission of those

statements). She failed to object when the prosecutor made a single reference to the "black ass" statement in his opening argument (JA 140-M), and her own attorney repeated the "black ass" comment in his opening statement (JA 160). Nor did the defendant object during Hairston's testimony when she referred to "black ass" and "you people" in describing Mohr's threat (JA 179-180). Indeed, Mohr's attorney himself elicited testimony about the "black ass" comment during his cross-examination of Hairston (JA 195-196). Mohr's counsel waited until after Hairston had finished testifying and the next witness was well into his testimony before he complained – in the form of a motion for a mistrial – about the "racially charged comment" that Hairston had mentioned in describing Mohr's threat (SA 106-107). In denying the motion, the district court advised Mohr's counsel that "your objection at this stage is after the witness has testified," and "nothing happened during the testimony that I was asked to do anything about" (SA 112). By this point, Mohr's objection was untimely (SA 109).

4. The District Court Took Steps To Minimize The Risk Of Prejudice

The district court greatly reduced the risk of prejudice by giving extensive cautionary jury instructions about the 404(b) evidence. The judge emphasized, among other things, that: (1) Mohr "is not on trial for committing any act not alleged in the indictment"; (2) the evidence of other acts may not be used as proof of "criminal personality or bad character"; and (3) the evidence of the Hairston and Sneed incidents is relevant only to whether Mohr acted "knowingly and intentionally and not because of some mistake, accident or other innocent reason"

and "may not be considered by you for any other purpose" (JA 558-559). This Court has found such instructions sufficient to overcome the risk of unfair prejudice presented by 404(b) evidence. See *Queen*, 132 F.3d at 993, 997-998; *Aramony*, 88 F.3d at 1378 & n.3. Indeed, a cautionary jury instruction about 404(b) evidence "cures any unfair prejudice except in the most extraordinary circumstances." *Id.* at 1378. The district court also offered to give a limiting instruction on the 404(b) evidence during trial, but Mohr's counsel declined the invitation (SA 211-212).

These instructions are just one example of the care the district court took to protect Mohr from unfair prejudice. Although the government sought to introduce evidence of six incidents involving Mohr's intentional misuse of her police dog, the court permitted testimony on only two (JA 112-114), despite finding all six incidents relevant (JA 68-69). Among the excluded incidents was one involving Mohr's use of a racial epithet that was much more inflammatory than the "black ass" comment in this case, see JA 50 (as Mohr released her dog on the man, she yelled, "Get him like a N----r!"), as well as another in which she used profanity while allowing her dog to attack a suspect who was being held down by another officer. JA 51 ("This is what we do to M----- F-----s that run."). Before agreeing to admit the evidence of the Hairston and Sneed incidents, the court undertook a careful examination of the underlying documentation for those two incidents to assess the reliability and potential prejudice of the material. The government put the defense on notice about these incidents nearly three months before trial began,

and the district court ruled on the admissibility of the evidence well in advance of trial, thus providing defense counsel ample opportunity to prepare to rebut the evidence. This advance notice prevented "trial by ambush," one of the dangers against which Rule 404(b) is designed to protect. *Queen*, 132 F.3d at 996-997. Especially in light of these safeguards, the court did not abuse its discretion in admitting the evidence of the Hairston and Sneed incidents.

II

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR OR ABUSE OF DISCRETION IN ADMITTING THE TESTIMONY OF DENNIS BONN ON REDIRECT EXAMINATION

A. The Admission Of Bonn's Voluntary Statement, If Appealable At All, Was Not Plain Error

Mohr argues on appeal (Br. 25-31) that the district court erred in allowing Dennis Bonn to read to the jury, during redirect examination, a statement that he made to the FBI on August 23, 2000 ("Voluntary Statement"). Specifically, Mohr contends that the statement was inadmissible hearsay because it was made after Bonn had a motive to lie.

Although, as set forth below (39-40, *infra*), a trial court's evidentiary rulings are normally reviewed for an abuse of discretion, Mohr cannot appeal this issue because it was her own counsel, not the government, who first divulged the substance of the Voluntary Statement to the jury. He did it initially in his opening statement (JA 151) and then later in cross-examining Bonn (SA 185-188, 196-197). Mohr's counsel then did not object when the United States introduced Bonn's

Voluntary Statement as an exhibit (JA 267), when Bonn read its contents to the jury (JA 267-268), or when her co-defendant published the written statement to the jury during re-cross examination (SA 208-209). In short, having made a tactical decision to divulge the substance of the Voluntary Statement in order to attack Bonn, and then having stood idly by while both the government and her co-defendant revealed the entire document to the jury, Mohr invited the conduct about which she now complains. Invited error is not reviewable. See *United States v. Neal*, 78 F.3d 901, 904 (4th Cir. 1996) (defendant "cannot complain of error which he himself has invited"). Even if this issue were appealable, the admission of the statement would be reviewed only for plain error, given Mohr's failure to object. See *United States v. Ellis*, 121 F.3d 908, 918-919 (4th Cir. 1997), cert. denied, 522 U.S. 1068 (1998).

There was no error here, much less plain error, because admission of the Voluntary Statement was appropriate under three evidentiary theories. It was properly admitted (1) under the "Doctrine of Completeness," *id.* at 920-921, Fed. R. Evid. 106; (2) for purposes of rehabilitation, *id.* at 918-920; and (3) as a prior consistent statement under Fed. R. Evid. 801(d)(1)(B). It does not matter under the first two evidentiary theories whether Bonn had a motive to fabricate the statement when he made it. See *Ellis*, 121 F.3d at 918-920. At any rate, despite extensive defense efforts to imply otherwise, when Bonn made the Voluntary Statement he had no motive to fabricate an account of the incident that implicated himself because he had not reached a plea agreement or even begun plea negotiations.

Indeed, he did not even have a lawyer at the time. See *United States v. Henderson*, 717 F.2d 135, 138-139 (4th Cir. 1983) (statement made after arrest but before plea agreement is admissible under Rule 801(d)(1)(B)), cert. denied, 465 U.S. 1009 (1984).

B. The Court Did Not Abuse Its Discretion In Allowing Bonn To Explain, On Redirect Examination, The Circumstances Under Which He Made The Voluntary Statement

The district court enjoyed broad discretion to determine whether the reference to the polygraph would be unfairly prejudicial under Rule 403, and that decision will not be overturned "except under the most extraordinary of circumstances." *Aramony*, 88 F.3d at 1377. Nevertheless, Mohr argues (Br. 31-34) that the trial court erred in allowing Bonn to explain, on redirect examination, his motivation for admitting in his Voluntary Statement that Delozier had asked him if Mohr's dog could "get a bite" and that he (Bonn) had agreed. Bonn testified on redirect that he made the admission because he was contemplating taking a polygraph examination and believed he would fail the test if he adhered to his earlier account of the incident. Bonn made clear that he ultimately chose not to take a polygraph test. Mohr claims that Bonn's mere reference to a polygraph examination – even one he decided not to take – was "unfairly prejudicial" (Br. 31-32). The district court did not abuse its broad discretion in allowing Bonn's testimony on redirect examination.

Mohr opened the door to the testimony about which she now complains. The United States provided written notice to Mohr well in advance of trial that if

the defense attacked Bonn's motives for making the Voluntary Statement, the government might ask him to explain on redirect examination that his true motive for giving the statement was the fear of failing a polygraph examination. Despite this notice, Mohr's counsel repeatedly suggested, during both the opening argument and cross-examination of Bonn, that Bonn had several possible improper motives for making the statement, including coaching by agents, an alleged financial motivation related to his pension, and an alleged desire to curry favor with the government in order to avoid prosecution on another unrelated misdemeanor charge. The defense went further, choosing to raise the specter of coercion by asking specific questions regarding the conditions under which the statement was made. See p. 11, *supra*.

In light of the defense strategy, it was only fair to allow the United States to correct the misimpression that Mohr had attempted to impart to the jury about Bonn's motivation for making his admission on August 23. Although Mohr was entitled to try to suggest, through cross-examination, that Bonn had an incentive to lie, she cannot "have [her] cake and eat it too," by denying the government the opportunity to respond. *Ellis*, 121 F.3d at 921. As this Court has recognized in a variety of contexts, it is not an abuse of discretion to allow the government to introduce evidence to correct a misleading impression left by the defense, even if that evidence would otherwise be inadmissible if the defense had not opened the door. See, *e.g.*, *United States v. Barber*, 668 F.2d 778, 785 (4th Cir.) (although it is generally impermissible to ask witness about his invocation of Fifth Amendment

privilege, prosecutor would be allowed to do so because defense opened the door with testimony that left a misleading impression), cert. denied, 459 U.S. 829 (1982); *United States v. Williams*, 106 F.3d 1173, 1177 (4th Cir.) (no abuse of discretion in admitting out-of-court statement where "defendant opened the door to this line of questioning" by engaging in cross-examination that had the potential to mislead the jury), cert. denied, 522 U.S. 847 (1997); *Ellis*, 121 F.3d at 926 (same).

Moreover, Bonn's reference to a polygraph could not have interfered with the jury's credibility determinations. This was not a case where the jury was exposed to the results of a polygraph test; Bonn made clear that he never actually took a polygraph examination (SA 198-205, 210). Nor was it a case involving improper vouching for the credibility of a government witness; Bonn made clear that it was his own decision not to take a polygraph test (SA 198-205, 210). Finally, there was no undue risk that the jury would believe that Bonn's Voluntary Statement was necessarily truthful simply because he testified it was prompted by the fear of failing a polygraph test. Bonn acknowledged during his testimony that he knew polygraph examinations were unreliable and inadmissible in court, and admitted that there were aspects of his Voluntary Statement that were yet inconsistent with his trial testimony (SA 198-205, 210). In light of this testimony and the hundreds of pages of unrelated cross examination, it was simply inconceivable that a reference to a potential polygraph examination would hinder the jurors' ability to judge for themselves Bonn's credibility.

That is especially true given the district court's jury instructions. The court properly instructed the jurors that they were "the sole judges of whether a witness should be believed" (JA 553). The judge also instructed the jury that the testimony of a government witness who had pled guilty to charges arising from the dog attack (an obvious reference to Bonn) "must be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe" (JA 555-556).

Allowing Bonn's testimony was fully consistent with this Court's polygraph decisions. On two occasions, this Court has held that it was improper to admit a plea agreement containing a provision requiring a witness to take a polygraph examination. See *United States v. Herrera*, 832 F.2d 833, 835-836 (4th Cir. 1987) (but error was harmless); *United States v. Porter*, 821 F.2d 968, 974 (4th Cir. 1987) (same), cert. denied, 485 U.S. 934 (1988). The danger in such cases is that the jury will think that a test was in fact administered or that the government, by presenting a witness whom it can require to take a polygraph test, is vouching for his or her veracity. But there was no chance that the jury believed either of these things in the case of Bonn, who made clear that it was he, not a government agent, who decided not to go through with the polygraph examination (SA 198-205, 210).[9]

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[9] The cases on which Mohr relies are inapposite. See Br. 32-33, citing *United States v. Zaccaria*, 240 F.3d 75 (1st Cir. 2001), and *Wolfel v. Holbrook*, 823 F.2d 970 (6th Cir. 1987), cert. denied, 484 U.S. 1069 (1988). Those cases stand for the proposition that it is impermissible to attack the credibility of the *opposing party's* witnesses by eliciting evidence that they did not take a polygraph examination. See

(continued...)

At any rate, Bonn's reference to the polygraph was harmless. The evidence of Mohr's guilt was sufficient without Bonn's testimony, and the information he provided was corroborated by other witnesses, including the two victims and three other police officers (compare SA 124-135, 138-145 (Bonn), with SA 66-85 (Officer Keith Largent), SA 27-40 (Officer Wendell Brantley), and SA 51-58 (David Wassink)). Therefore, the admission of Bonn's testimony on redirect examination cannot be reversible error. See *Porter*, 821 F.2d at 974 (finding harmless error after noting that "[t]he evidence of guilt was sufficient without [the witness's] testimony" and that "[the witness's] evidence was corroborated").

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION OR COMMIT PLAIN ERROR IN ADMITTING THE EXPERT TESTIMONY OF DR. JAMES FYFE AS REBUTTAL EVIDENCE

A. Standard Of Review

A trial court "has broad discretion in determining whether to admit expert testimony," and if a timely objection was raised below, the admission of such evidence will not be reversed "absent a clear abuse of discretion." *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1358 (4th Cir. 1995). If the defendant failed to properly object in the district court, this Court will review the admission of the expert testimony only for plain error. *United States v. Gastiaburo*, 16 F.3d 582,

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[9](...continued)
Zaccaria, 240 F.3d at 81; *Wolfel*, 823 F.2d at 974-975. The government plainly did not do that here.

587 (4th Cir.), cert. denied, 513 U.S. 829 (1994). As explained below, some of Mohr's challenges to the admission of Fyfe's testimony are reviewed for abuse of discretion, while others are examined only for plain error. The district court did not abuse its discretion or commit plain error in permitting this expert testimony.

B. The District Court Did Not Abuse Its Discretion In Allowing Fyfe To Testify That Mohr's Conduct Was Not In Accord With Prevailing Police Practices In 1995

Mohr argues (Br. 38-40) that the district court violated Fed. R. Evid. 702 and 704 by allowing Fyfe to express an opinion on whether Mohr's actions in releasing her police dog on Mendez were in accord with "prevailing police practices" as of 1995. The district court did not abuse its discretion in admitting this testimony.

In cases alleging that police officers used excessive force, "[c]ourts generally allow experts in this area to state an opinion on whether the conduct at issue fell below accepted standards in the field of law enforcement." *Zuchel v. City & County of Denver*, 997 F.2d 730, 742 (10th Cir. 1993); accord *Samples v. City of Atlanta*, 916 F.2d 1548, 1550-1551 (11th Cir. 1990). In *Zuchel*, the court held that Fyfe, the same expert at issue here, complied with Rule 702 when he testified that a police officer's use of deadly force was inappropriate in light of generally accepted police practices. 997 F.2d at 742-743.

That holding is consistent with this Court's decision in *Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993), an excessive force case against PG County police officers who beat, and permitted a police dog to attack, the plaintiffs' son. The district court in *Kopf* had prevented plaintiffs from calling two expert witnesses, one of

whom would have testified that a police officer's actions in permitting the dog attack "were unreasonable and violated accepted police practices." *Id.* at 378. The other expert would have testified that the use of "slapjacks" to beat the plaintiffs' son was "brutal and excessive." *Ibid.* This Court held that the two experts should have been allowed to testify, although it did not expressly decide the proper scope of their testimony on remand. *Id.* at 379 & n.3. In reaching its decision, this Court explained that expert testimony about "accepted police practices" is often helpful to juries in excessive force cases, and particularly so when the use of force involves an attack by a trained police dog. *Id.* at 378-379. See also *Vathekan v. Prince George's County*, 154 F.3d 173, 176 (4th Cir. 1998) (favorably quoting expert's opinion that officer "violated generally accepted police standards, practices and policies by failing to give a warning" before releasing police dog).

This Court relied on *Kopf* in upholding the admission of expert testimony in *Thorne v. Wise*, 47 F.3d 1165, 1995 WL 56652 (4th Cir. Feb. 3, 1995) (copy in addendum), a case involving excessive use of force. *Id.* at **5 n.12. There, the Court found neither plain error nor abuse of discretion in allowing an expert to testify that the force used by the defendant police officers was "excessive" in light of "the police standard of conduct and the degree of force reasonably necessary under the circumstances." *Id.* at **3, **5 n.12. In light of this caselaw, the admission of Fyfe's testimony about prevailing police practices was not an abuse of discretion.

Fyfe's testimony was especially appropriate in this case because it responded directly to the testimony of two defense witnesses – the defendant and Paul Mazzei, her former training officer. The prevailing police practices and standards about which Fyfe testified were embodied in the PG County Police Department policies and training materials (JA 481) that were used to train Mohr and about which Mazzei testified at length (see, *e.g.*, JA 318-321, 333, 359-360).

Fyfe's testimony was directly responsive to the defense case. As explained above (pp. 7-8, *supra*), Mohr's and Mazzei's testimony was designed, in combination, to convey the impression that Mohr's version of events on September 21, 1995 was "by the book." The defense apparently hoped that the jury would conclude from that testimony that Mohr's version of the incident made sense from a police training perspective and was therefore plausible. The defense also hoped (see Br. 43) that the jury would conclude that if Mendez actually made a sudden move during the incident, then Mohr's actions were in complete accord with her training and thus did not reflect an intentional use of unreasonable force. Fyfe's testimony countered this inference by showing both that Mohr's version of events did not make sense from a training perspective and that the alleged movement by Mendez would not have justified the release of the dog under prevailing police standards. This was proper rebuttal testimony.

Mohr argues, however, that Fyfe's testimony violated Rules 702 and 704 by stating a legal conclusion that told the jury what verdict to reach on the ultimate

issue of whether Mohr's conduct was "objectively reasonable" (Br. 41). In fact, Fyfe's testimony was permissible under both rules.

As an initial matter, an expert witness may express an opinion on an ultimate issue in the case if that testimony is otherwise admissible. Fed. R. Evid. 704(a). Despite Rule 704, expert testimony on an ultimate issue may be excluded if it does not "assist the trier of fact." Fed. R. Evid. 702. *United States v. Barile*, 286 F.3d 749, 759-760 (4th Cir. 2002). This Court has recognized that "[e]xpert testimony that merely states a legal conclusion is less likely to assist the jury in its determination," and thus may be excludable under Rule 702 in some, but not all, cases. *Id.* at 760 & n.7. "To determine when a question posed to an expert witness calls for an improper legal conclusion, the district court should consider first whether the question tracks the language of the legal principle at issue or of the applicable statute, and second, whether any terms employed have specialized legal meaning" different "from that present in the vernacular." *Id.* at 760.

Fyfe's testimony was permissible under this standard. He testified that even accepting as true Mohr's account of Mendez's behavior, Mohr's release of the police dog without issuing a canine warning was not in accord with "prevailing police practices." The term "prevailing police practices" does not appear in 18 U.S.C. 242, is not one of the elements of the offense, and has no "specialized legal meaning." *Barile*, 286 F.3d at 760. Fyfe's testimony thus cannot be construed as a legal opinion.

C. The District Court Did Not Commit Plain Error In Allowing Fyfe To Make Four Additional Comments Explaining The Basis Of His Testimony About Prevailing Police Practices

Defendant argues in the alternative (Br. 35, 40 & n.5, 41) that, even if it was proper for Fyfe to testify that Mohr's conduct was not in accord with prevailing police practices, the district court nonetheless erred in allowing him to make four additional statements in explaining the basis for that opinion. Mohr, however, did not object to any of these statements in the district court (see JA 473, 477-478) and thus their admission must be upheld absent plain error. There was no error here, much less plain error.

First, Mohr complains (Br. 39) about Fyfe's use of the term "reasonably necessary." When asked to explain how he came to his opinion that Mohr's conduct was not in accord with prevailing police practices, Fyfe responded: "You really have to take into account the totality of the circumstances and the idea that the police should use no more force than is necessary, reasonably necessary, in the totality of the circumstances" (JA 473). This testimony is unremarkable because it simply responded to a question about "prevailing police practices" and essentially repeated what Mohr and Mazzei had already stated in their testimony (see SA 228-230; JA 319). Its admission certainly was not plain error in light of the district court's cautionary jury instruction:

> Some of the witnesses may themselves have used the word reasonable during their testimony, and their use of the word may or may not have been consistent with the explanation included here. You must follow these instructions in determining whether or not the force used was reasonable.

JA 577.

The other three statements Mohr challenges on appeal (Br. 35) are Fyfe's testimony that Mohr's release of the dog was "inappropriate" (JA 477), that Mohr had "plenty of time" to give a canine warning before releasing the dog, and that there was "no reason" not to issue such a warning (JA 478). None of these statements has a specialized legal meaning, see *Barile*, 286 F.3d at 760, and thus Fyfe's use of them does not constitute an impermissible legal opinion under Rule 702. See *Zuchel*, 997 F.2d at 742-743 (upholding Fyfe's testimony that police officer's use of deadly force was "inappropriate"); see also *Thorne*, *supra*, 1995 WL 56652, at **3 (allowing an expert witness to opine that the force used by defendant police officers was "excessive"); *Slakan v. Porter*, 737 F.2d 368, 375, 378 (4th Cir. 1984) (upholding admission of expert testimony, in an excessive force case, that use of water hoses against inmates was not "an acceptable control measure"), cert. denied, 470 U.S. 1035 (1985). In addition, taken in context, these statements are simply an explanation of prevailing police practices.

Finally, the jury instructions in this case minimized the risk that Fyfe's testimony would interfere with the jury's factfinding duties:

> You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept this witness's testimony merely because he is an expert, nor should you substitute it for your own reason, judgment and common sense. The determinations of the facts in this case rests solely with you.

JA 559-560. These instructions further confirm that the admission of Fyfe's testimony was neither plain error nor abuse of discretion. See *Slakan*, 737 F.2d at

378 (emphasizing, in upholding admission of expert testimony, that the district court took the "cautionary step of instructing the jury as to the proper weight to be given to the expert's opinions").

IV

MOHR IS PRECLUDED FROM RAISING HER INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON DIRECT APPEAL

A claim of ineffective assistance of counsel should be raised in the first instance in the district court under 28 U.S.C. 2255, "unless it 'conclusively appears' from the record that defense counsel did not provide effective representation." *United States v. Richardson*, 195 F.3d 192, 198 (4th Cir. 1999), cert. denied, 528 U.S. 1096 (2000). Mohr nevertheless argues (Br. 44) that her trial attorney provided ineffective assistance when he failed to raise a timely constitutional challenge to the jury selection procedures in this case. Specifically, Mohr contends that the District of Maryland's jury selection plan and 28 U.S.C. 1863(b)(6), which exclude police officers and others from jury service, violate the Sixth Amendment (Br. 45). She claims that the district court would have dismissed the indictment if her trial counsel had raised this constitutional challenge in a timely fashion.

Mohr cannot raise this claim on direct appeal because the record reveals no ineffectiveness. The results in this case (including Mohr's acquittal on the conspiracy count) and the extent and quality of the pretrial motions filed by Mohr's counsel hardly indicate substandard representation.

At any rate, the failure to raise a timely Sixth Amendment challenge to the exclusion of police officers from jury service cannot be ineffective assistance of counsel because the constitutional claim is meritless. Mohr neglects to mention that her constitutional argument has been rejected by the only federal court of appeals that has considered the issue. See *United States v. Terry*, 60 F.3d 1541, 1543-1544 (11th Cir. 1995) (Section 1863(b)(6)'s exemption of police officers from serving as grand and petit jurors did not violate the Sixth Amendment), cert. denied, 516 U.S. 1060 (1996); see also *Government of the Canal Zone v. Scott*, 502 F.2d 566, 569 (5th Cir. 1974) (categorical exclusion of military personnel from jury duty does not violate Sixth Amendment). Mohr has not identified, and we are not aware of, a single decision that has reached the opposite conclusion. A claim of ineffective assistance certainly cannot be based on the failure of an attorney to raise a constitutional challenge that no court has yet endorsed. *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995), cert. denied, 517 U.S. 1171 (1996).

V

THE COURT'S EVIDENTIARY RULINGS DO NOT CONSTITUTE CUMULATIVE ERROR JUSTIFYING A NEW TRIAL

Finally, Mohr argues (Br. 50-51) that even if the court's rulings, considered individually, do not justify reversal, the court nonetheless committed multiple errors whose cumulative effect warrants a new trial. As we have explained, however, the district court did not abuse its discretion or otherwise err in making any of the challenged evidentiary rulings, and thus the cumulative-error analysis is

inapplicable. Even assuming error occurred, no reversal is warranted provided this court concludes merely "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *United States v. Heater*, 63 F.3d 311, 325 (4th Cir. 1995), cert. denied, 516 U.S. 1083 (1996), quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

CONCLUSION

Defendant's conviction should be affirmed.

Respectfully submitted,

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ADDENDUM TABLE OF CONTENTS

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28 U.S.C § 1863 (b)(6) Plan for random jury selection

(b) Among other things, such plan shall-

(6) specify that the following persons are barred from jury service on the ground that they are exempt: (A) members in active service in the Armed Forces of the United States; (B) members of the fire or police departments of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession; (C) public officers in the executive, legislative, or judicial branches of the Government of the United States, or of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession, who are actively engaged in the performance of official duties.

Federal Rules of Evidence:

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(b) **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Federal Rules of Evidence (continued):

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliable to the facts of the case.

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Rule 801. Definitions

The following definitions apply under this article:

(d) Statements which are not hearsay. A statement is not hearsay if–

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2002, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were served by Federal Express, next business day delivery, on the following counsel of record for the Appellant:

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I further certify that copies of the same brief were filed in accordance with Fed. R. App. P. 25(a)(2)(B)(i) by sending them to the Clerk of the United States Court of Appeals for the Fourth Circuit by first-class mail, postage prepaid, on August 12, 2002.

_____
JESSICA DUNSAY SILVER
Attorney